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NO. _____

Supreme Court, U.S.
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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

PAUL ALAN WOTNOSKE,

PETITIONER,

vs.

STATE OF WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented for review is:

In light of this Court's decision in Welsh v. Wisconsin, 466 U.S. 740 (1984), may a state court uphold a warrantless entry into the curtilage of a home as reasonable without a finding of exigent circumstances when police officers make the warrantless entry to investigate a municipal ordinance violation?

Furthermore, if this petition is granted, the Court should also answer the question left unanswered in Welsh, whether the Fourth Amendment may impose an absolute ban on warrantless home searches and arrests for certain minor offenses? See Welsh, 466 U.S. at 749 n.11.

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PAUL ALAN WOTNOSKE,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

The petitioner Paul Alan Wotnoske respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals of Wisconsin rendered on May 26, 1993.

OPINIONS BELOW

The decision and the order of the Court of Appeals of Wisconsin, District II, is unreported. It is printed in the Appendix. (See App. 3-18).

The decision of the Waukesha County

Circuit Court, the Honorable Kathryn Foster presiding, is not reported. It is printed in the Appendix. (See App. 19-27).

JURISDICTION

The judgment of the Court of Appeals of Wisconsin, District II, was entered on May 26, 1993, affirming petitioner's conviction dated on January 31, 1992. Thereafter, on August 17, 1993, the Wisconsin Supreme Court denied a petition for review. This Court has jurisdiction based on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV

U.S. CONST. amend. XIV

The constitutional provisions involved are set forth verbatim in the Appendix. (See App. 33-34).

STATEMENT OF CASE

On July 4, 1990, City of New Berlin police officer Paul Repischak was assisting other officers at an under-age drinking party when he heard the sound of fireworks. As he went to

investigate the location of the fireworks, he heard but did not see additional fireworks going off. (19: 12). He approached the vacant front yard of Paul Wotnoske's residence. (19: 12). After Repischak was joined by another officer, a group of persons came out of the Wotnoske residence. (19: 13). He issued a verbal warning to the group regarding the fireworks discharge, even though he had not seen any fireworks discharge at this residence. (19: 14).

Following this encounter, Repischak walked west to return to his vehicle. As he walked from the Wotnoske property, he heard firecrackers discharge. (19: 15). He saw smoke on the Wotnoske's front lawn and saw a group of people entering the residence's front door. (19: 16). He testified that he did not pursue them; he radioed another officer and waited for him. (19: 16).

While waiting in front of Wotnoske's home, Repischak heard, but did not see, another

fireworks discharge. (19: 17). He testified that he believed that the discharge had occurred in Wotnoske's backyard. (19: 18). He testified that he could not see into the backyard from the street, (19: 22), nor had he seen any smoke from his position in front of the home, (19: 31).

Corporal Streubing and Officer Szcerba arrived shortly after Repischak heard the last fireworks discharge. The three officers then approached Wotnoske's home, went around the garage, and entered the backyard behind the home. (19: 17). They did not go to the home's front door nor did they summon anyone before entering the backyard. (19: 28).

The officers did not have a warrant when they entered the backyard. (19: 29). Repischak testified that the officers did not obtain a warrant because they feared that the party discharging the fireworks would not be there when they returned. (19: 30). He testified that while walking around the home to

the backyard, the officers did not pursue or chase the persons whom the officer had seen entering the home. (19: 18). Repischak testified that they entered the backyard without obtaining consent, (19: 19-20), in order to identify the party discharging the fireworks, (19: 29).

They saw Paul Wotnoske sitting on a chair on the patio. (19: 18). Repischak testified that he saw evidence of fireworks discharge on the ground near Wotnoske, (19: 9); he also testified that neither he nor any other officer gathered any of the alleged evidence. (19: 19). Repischak testified that he concluded that Wotnoske was the person who had discharged the fireworks that he had heard while in the front yard. (19: 31). The officers approached Wotnoske and told him that he would be receiving a summons for a violation. (19: 19).

Wotnoske testified that as he waited in his backyard for his girlfriend to come out of his home, several officers approached him in

his backyard. (19: 35). In response to their questions, he informed them that he had not lit any fireworks in the backyard. (19: 36). Wotnoske testified that he had not seen anyone else light fireworks in his backyard. (19: 45). He did not see or smell any smoke in his backyard. (19: 46).

Wotnoske testified that he did not give the officers permission to enter the backyard, nor was his residence's backyard generally accessible to the public. (19: 36). He testified that the backyard is a private area of the residence, used only by the immediate family. (19: 41). Guests are occasionally invited to this area. (19: 41). He testified that people had been cutting through adjacent yards that day, however, no one had gone through his backyard. (19: 46).

Max Wotnoske, Paul's father, testified that he and his wife own the property. (19: 52). He considers the backyard patio area to be part of the private area of his home and

does not allow uninvited people into that area. (19: 57). Even his two sons must receive permission before having friends over. (19: 58).

After seeing the officers, Max went out to them and asked them what they wanted. Repischak told him about the alleged fireworks violation and Max told them that they had no permission to be on his property or in his backyard. (19: 37, 53). The officer replied that he wanted to give Paul a ticket for fireworks. (19: 53 & 61). Max asked the officer to leave, but the officer stated that he did not have to leave. (19: 53). Max gave the officer his name and asked the officer to give him the ticket. (19: 53). Rennie Wotnoske, Paul's mother, had also told the officers to write the citation to the house. (19: 37).

The officers subsequently physically "took down" Paul. Although he did not struggle with them, one of the officers tackled him. (19:

48). When he was tackled, Wotnoske's head struck a rock which was embedded in the ground. He did not realize that the officers were trying to handcuff him until they told him to relax. (19: 50). He did not struggle as the officers handcuffed him. (19: 51).

On July 5, 1990, the Waukesha County District Attorney charged Wotnoske with resisting an officer and battery to a law enforcement officer. Wotnoske was bound over on these charges.

Wotnoske moved to suppress the search and arrest made by City of New Berlin police officers, evidence obtained by the officers, and the officer's testimony. He claimed the officers had violated his Fourth Amendment rights by making a warrantless entry into his home's curtilage without probable cause or exigent circumstances. (See 19: 67-72).

The Waukesha County Circuit Court ruled on the Fourth Amendment issues at a pre-trial motion hearing held on December 9, 1991. (See

19: 2-78). In its introductory remarks, the court stated that if it found the curtilage protected by the Fourth Amendment, it would determine "whether or not the officer then had probable cause or exigent circumstances to proceed into that area." (19: 73; App. 19) (emphasis added). The court described the curtilage issue as a close call, but did not decide the issue. (19: 76-77).

Although it questioned whether the backyard was protected by the Fourth Amendment, the Waukesha County Circuit Court denied suppression on the basis that the police officers had probable cause and acted reasonably. (19: 72-78: App. 24-26). The court explicitly declined to decide whether the officers acted under exigent circumstances. (19: 76-77; App. 24-25). It ruled that

> under the circumstances stated here, the officer did have probable cause. Whether the discharge of fireworks themselves gives rise to exigent

> circumstances, I am not going to decide since the exceptions are in the disjunctive. It is either one or the other. And under the findings of this court, that again, there was probable cause to believe in this case that an ordinance was being violated, that the officer at this point had the authority to step onto the Wotnoske property.

(19: 76-77; App. 24-25) (emphasis added).

The case went to trial and a jury acquitted Wotnoske of battery to a peace officer, but found him guilty of resisting an officer. (19: 920). The court sentenced Wotnoske to six (6) months incarceration in the Waukesha County Jail with work release privileges and to two (2) years of probation. (R. at 10; 20: 13). As a condition of the probation, the court ordered him to pay restitution for the lost wages and medical expenses of an officer, Corporal Streubing.

Wotnoske moved the court for post-conviction relief challenging the officers' warrantless entry as violative of his fourth amendment rights. The court denied this motion. (21: 12-15; App. 28-33).

Wotnoske appealed to the Wisconsin Court of Appeals, which affirmed the trial court's decision in an unpublished decision. State v. Wotnoske, No. 92-2521-CR (Wis. Ct. App. May 26, 1993); see App. 3-18. Wotnoske again asserted that the officers did not have exigent circumstances or probable cause to make the warrantless entry. Although it conceded that the backyard area was protected under the Fourth Amendment, the court ruled that the police officers had had probable cause and had acted reasonably. Id. at 6-7; App. 12. The court addressed the exigency question and disagreed with Wotnoske's position, did not affirmatively state that exigent circumstances existed to justify the officers' invasion of the curtilage. Id. at 7-9; App. 12-15.

Wotnoske filed a Petition for Review to the Wisconsin Supreme Court which was denied. Wis. Sup. Ct. Order (Aug. 17, 1993); App. 2. Notably, the Wisconsin Attorney General accepted the court of appeals' assumption that the backyard area was protected curtilage. (See Resp. in Opp'n to Pet. for Review at 1, para. 2).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE WISCONSIN COURT OF APPEALS DEPRIVES STATE CITIZENS OF FOURTH AMENDMENT PROTECTION GUARANTEED THEM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CONFLICTS WITH FEDERAL CASE LAW BECAUSE THE COURT OF APPEALS ALLOWED A TRIAL COURT TO UPHOLD A WARRANTLESS ENTRY BY POLICE OFFICERS INTO PROTECTED CURTILAGE WITHOUT MAKING A FINDING THAT EXIGENT CIRCUMSTANCES JUSTIFIED THE ENTRY.

Review of the Wisconsin Court of Appeals decision is necessary because this state court

of last resort has decided an important question of federal law in a way that conflicts with applicable decisions of the United States Supreme Court. The appellate court's decision erodes a citizen's right to be free from warrantless governmental searches and seizures in the curtilage of his home absent exigent circumstances and probable cause.

The lower courts' rulings are contrary to the United States Constitution, as well as this Court's decisions that protect a citizen's right to be free from warrantless governmental searches and seizures absent probable cause and exigent circumstances. See U.S. CONST. amend. IV and XIV; for federal case law requiring both probable cause and exigent circumstances, see United States v. Dunn, 480 U.S. 294 (1987); Welsh v. Wisconsin, 466 U.S. 740 (1984); Oliver v. United States, 466 U.S. 170 (1984); Payton v. New York, 445 U.S. 573 (1980).

The Supreme Court should clarify the law on curtilage and decide whether reasonable

police activity can replace the requirement of exigent circumstances for warrantless searches and seizures in the curtilage of a home.

A. The court of appeals decision conflicts with applicable federal case law requiring the State to show exigent circumstances allowing police officers to make a warrantless entry because it either omitted a discussion of exigency or it replaced that requirement with reasonableness.

The court of appeals affirmed the trial court ruling. The court ruled that the police officers had probable cause and acted reasonably. State v. Wotnoske, No. 92-2521-CR slip. op. at 7 (Wis. Ct. App. May 26, 1993); see App. 14 (emphasis added).

The court stated "[w]e agree that the officers had probable cause based upon their knowledge and observations made as to a continuing violation of the city of New Berlin fireworks ordinance and that they acted

reasonably in proceeding to the area of the infraction to investigate the violation and locate the perpetrator." Wotnoske, slip op. at 7.

In Welsh v. Wisconsin, this Court reaffirmed that police must have exigent circumstances in order to make a warrantless entry into the home. See Welsh, 466 U.S. at 748-53. Further, this exigent circumstances exception to the warrant requirement should rarely be used when there is probable cause to believe that only a minor offense has been committed. Id. at 753.

The court of appeals opinion essentially eliminates Welsh's exigent circumstances requirement for warrantless searches. It upheld the warrantless entry on the basis of probable cause and reasonable police action to investigate and locate the responsible party to the offense. The court, therefore, either completely omitted any consideration of exigency or replaced the exigency requirement

with reasonableness.

If the court omitted exigency altogether, then that omission alone serves as a basis to reverse its decision.

If the court replaced exigency with reasonableness, then that also is a basis for reversal because no amount of probable cause can justify a warrantless search or seizure, in the absence of exigent circumstances. See Coolidge v. New Hampshire, 403 U.S. 443, reh'g denied, 404 U.S. 874 (1971).

B. The court of appeals decision conflicts with applicable federal case law requiring the State to show exigent circumstances allowing police officers to make a warrantless entry because its decision has relieved the State of its heavy burden to show the existence of exigency.

The presumption that the officers acted per se unreasonably can be rebutted only when they show both probable cause and exigent

circumstances. Police bear a heavy burden to show exigency when making warrantless entries; application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed. See Welsh, 466 U.S. at 749-50 & 753.

Welsh did not set-up this test of reasonableness as "probable cause and reasonable police activity"; rather, a warrantless search in the home and its curtilage is reasonable if and only if the police had both probable cause and exigent circumstances. According to Welsh, the presumption of unreasonableness is difficult to rebut when the underlying offense is a minor violation.

Because neither the court of appeals nor the circuit court (see section D. infra) found exigent circumstances to validate this otherwise presumptively unreasonable entry and

search, the presumption of unreasonableness has not been rebutted. Therefore, the entry and search are unreasonable under the standards set forth by this Court in Welsh.

C. The court of appeals erred because it based its ruling on an erroneous finding of fact that even conflicts with the trial court's finding.

The court of appeals also distinguished this case from the facts of Welsh v. Wisconsin, 466 U.S. 740 (1984), citing that here a police officer witnessed the violation, while in Welsh, a witness had observed the violation. Wotnoske, No. 92-2521-CR, slip op. at 8-9; App. 13-15.

The court, however, based its decision on an erroneous finding of fact.[1] The court

[1]The court of appeals also made another error of fact which the petitioner does not challenge at this point. It found that persons had crossed through Wotnoske's backyard. Wotnoske, slip. op. at 4-5; App. 10-11. Petitioner, however, had corrected this trial court error at the pre-trial hearing. See (19: 78); App. 11. This error is not challenged

stated, "In this case, Officer Repischak personally observed the violation." Wotnoske, slip op. at 9.

Actually, Repischak did not observe the violation. Repischak even testified that he was in front of the home when the last discharge occurred and could not see into the backyard. (19: 17-18, 22). The discharges that Repischak did observe occurred prior to the discharges that Repischak heard, but did not see, in or around the backyard.

While rendering its ruling on the pre-trial suppression motion, the circuit court stated that "[w]hat is also established by the record today and in essence not contested by the State . . . is that standing in the front of the residence on the date in question, [Officer Repischak] was not able to observe the backyard and therefore, observe who may or may

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because the court of appeals assumed that the backyard was indeed curtilage protected by the Fourth Amendment. See Wotnokse, slip. op. at 5-6; App. 29-30.

have set off the fireworks that he describes hearing at this particular time." (19: 74; App. 21).

Therefore, the court failed to adequately distinguish this case from Welsh. It erred because its decision was based on an erroneous finding of fact. Repischak could not have observed the alleged violation occurring in or around the backyard as the court of appeals found.

D. The trial court decision conflicts with federal cases because it explicitly declined to make a finding that exigent circumstances existed.

In addition to the Court of Appeals' erroneous ruling, the trial court's decision also conflicts with federal case law because it explicitly declined to make any findings as to the exigency allowing the officers to make their entry.

At the pre-trial hearing, Wotnoske moved to suppress his arrest, any evidence obtained

by the officers, and any testimony by the officers as fruits of the illegal entry, search, and seizure. (See 19: 2-78).

The court ultimately upheld the warrantless entry and search and denied suppression. It interpreted the law requiring probable cause and exigent circumstances as disjunctive; the officers needed either probable cause or exigent circumstances. Accordingly, the officers did not need exigency because they had probable cause.

This interpretation of law, however, is erroneous. The circuit court did not dispute that the backyard was protected curtilage. The officers, therefore, needed probable cause and exigent circumstances in order to make their warrantless entry into the curtilage for the purposes of search and seizure.

The circuit court failed to test both prongs required by Welsh and Payton to validate a warrantless entry into the curtilage. It needed to make this finding to ensure that the

State satisfy its heavy burden and justify the warrantless entry for a minor ordinance violation. See Welsh, 466 U.S. at 749-50 & 753 (police bear a heavy burden to show exigency when making warrantless entries; application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed); Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show . . . the presence of 'exigent circumstances'").

Wotnoske has suffered prejudice from this legal error. The admission of evidence has led to Wotnoske's conviction for resisting arrest. He is currently serving a six month jail sentence in the Waukesha County Jail with Huber work release privileges. He must also pay an officer restitution as ordered by the circuit

court. Had that court properly applied both prongs, it may have found exigency lacking and suppressed the fruits of the illegal entry.

E. In addition to the lower court's errors, the officers did not act under any exigency, and thus, the warrantless entry into the curtilage for a minor offense, an ordinance violation, violates the Fourth and Fourteenth Amendments and conflicts with federal case law.

The officers lacked exigent circumstances to enter onto the curtilage of the Wotnoske residence.

Exigent circumstances include: (1) the need for hot pursuit, (2) the need to prevent harm to the offender and the public, and (3) the need to prevent destruction of evidence. Welsh v. Wisconsin, 466 U.S. 740, 748 (1984).

Repischak and the other officers entered into the curtilage in order to identify the party discharging the fireworks. (19: 29).

Repischak waited in front of Wotnoske's residence until the other officers arrived. Even the court of appeals found that "within at minute after hearing additional fireworks, the officers proceeded to investigate Wotnoske's backyard." Wotnoske, No. 92-2521-CR, slip op. at 9.

Repischak testified that the officers were not in hot pursuit. (19: 18). He did not testify that harm threatened the public or the offender. He also did not testify that they sought to prevent the destruction of evidence of the ordinance violation. In fact, on direct examination, Repischak affirmatively answered the State's question that fireworks evidence is destroyed quickly. (19: 29). Neither Repischak nor any of the other officers collected any of the debris which they allegedly saw. (19: 19).

Even if the officers sought to discover evidence of the ordinance violation, their entry was nonetheless prohibited by this

Court's holding in Welsh. In Welsh, officers sought to justify their warrantless entry for a minor violation on the basis that alcohol in Welsh's blood would dissipate, and therefore, this exigency required them to make the entry. This Court rejected the proffered "exigency" for the entry due to Wisconsin's minor interest in drunk driving violations.

In this case, officers knew that little if any evidence would remain of the fireworks discharges. They also did not collect any such evidence.

According to Welsh, the State's lack of interest in this activity does not permit the officer's entry to preserve such evidence. The State has not criminalized this activity; rather, it delegated the power to prohibit this activity to the individual municipalities.

This offense did not constitute an overwhelming threat to the surrounding community; perhaps the only menace posed to the community was the nuisance of the fireworks

noise. And according to Welsh, the officers' knowledge that someone nearby had discharged fireworks did not create exigency necessary to validate a warrantless entry. See id. at 753.

The warrantless search was unreasonable because the underlying offense was extremely minor--a municipal ordinance violation prohibiting fireworks discharges.

> In Welsh, this Court clearly asserted that
>
> [w]hen the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

Welsh, 466 U.S. at 750 (citation omitted) (footnote omitted). This Court also stated that no exigency is created simply because there is probable cause to believe that a serious crime has been committed. The exigent-

circumstances exception should rarely be allowed in the context of a home entry when there is probable cause to believe that only a minor offense has been committed. Id. at 753 (emphasis added).

In this situation, the officers searched and seized Wotnoske in the privacy of his backyard for a noncriminal, municipal ordinance violation. While the officers may have feared the disappearance of evidence of the discharge, this concern pales when confronted with the interest shown by the State in precipitating a search and seizure for the violation. The offense was merely an ordinance violation. Comparable to the scenario in Welsh, such a municipal ordinance violation should not support a warrantless search and seizure in the curtilage simply because evidence may have disappeared while the police obtained a warrant.

Absent exigent circumstances, the law required the officers to obtain a warrant prior

to entering into the Wotnoske curtilage. Because the officers lacked a warrant and exigent circumstances, their entry into the curtilage was per se unreasonable and illegal. The lower courts should have suppressed Wotnoske's arrest, all evidence resulting from the entry, search, and seizure, and the officers' testimony as fruits of the illegal entry. See Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

F. In addition to their illegal entry, the officers also violated Wotnoske's right to be free from warrantless seizures because his answers to the officers' questions did not give the officers probable cause to believe that he had committed the ordinance violation.

In addition to exigent circumstances, the officers also lacked probable cause. The officers did not have facts and circumstances

within their knowledge sufficient to warrant a reasonable person to conclude that Paul Wotnoske had committed or was in the process of committing an offense. In fact, the officers did not actually know who discharged the third set of fireworks because they never actually saw anybody discharge the firecrackers. (19: 17.

Clearly, Repischak had a suspicion that someone nearby was discharging fireworks. But he did not have probable cause to believe that Wotnoske, in particular, was the violator. The officers waited almost one minute before illegally entering the curtilage. Within that timeframe, the actual violator could have entered the Wotnoske home, run across neighboring yards, or otherwise disappeared.

Upon seeing Wotnoske, Repischak all too quickly concluded that he had to be the offender. (19: 31). The officer failed to reasonably consider whether other persons had been in the area or whether fireworks had been

discharged nearby. The officer also failed to consider the earlier incident, when he heard fireworks discharge after issuing the verbal warning, turned, and saw a group of persons quickly entering the Wotnoske residence. (19: 15-16). Although he knew that someone in the group had lit the fireworks, he did not know exactly which person had done so.

While an officer can make a warrantless arrest if an ordinance violation was committed in his presence, the fireworks offense did not occur in Repischak's presence. Although Repischak heard the sound of discharging fireworks, he did not see the discharges. (19: 17). Repischak had, at most, a reasonable suspicion that <u>someone</u> near the Wotnoske residence was discharging fireworks. The officer, however, lacked any probable cause to believe that Wotnoske was the responsible party.

A police officer who lacks probable cause but whose reasonable suspicions lead him

reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime may detain the person briefly to investigate the situation. Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (citation omitted). This means that the officer may ask the detainee a moderate number of questions to determine the person's identity and to try to obtain information confirming or dispelling the officer's suspicions. Id. at 439. "But the detainee IS NOT obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he MUST THEN BE RELEASED." Id. at 439-40 (emphasis added); cf. Terry v. Ohio, 392 U.S. 1, 34 (1968) (WHITE, J., concurring opinion).

The person's refusal to respond does not, without more, furnish an articulable basis to support a suspicion of criminal activity. Florida v. Royer, 460 U.S. 491, 498 (1983) (citing United States v. Mendenhall, 446 U.S. 544, 556 (1980)).

Wotnoske's refusal to identify himself to the officers does not automatically result in obstruction of an officer. Wotnoske was not obligated to speak to the officers. As the officers had only a hunch that Wotnoske may have committed the offense, they were entitled to ask Wotnoske questions which would dispel their suspicion. Wotnoske, however, was not obligated to respond to their questions.

In fact, Wotnoske attempted to placate the officers' suspicions by informing them that he had not discharged any fireworks. As Wotnoske's comments could not have given rise to probable cause, the officers were legally obligated to release him from their detention and leave the curtilage.

Wotnoske, unfortunately, happened to be sitting where the officers believed they had heard the fireworks discharge, not where they saw the discharges. Such discharges could have easily occurred on other neighboring properties. The discharges could have also

occurred on the Wotnoske property, but not due to any actions of Wotnoske.

Even if fireworks did discharge on the property, the officers still lacked probable cause to believe that Wotnoske was the responsible party. When the officers arrived in the backyard, Wotnoske did not flee the area. Instead, he asked to know the reason for the officer's intrusion into the patio area. While he and the officers were talking, Max Wotnoske appeared. After identifying himself, he told the officers that he would take the citation which the officers intended to issue. (19: 61). He did not contest the citation; he merely submitted himself to the fact that the officers were going to issue him a citation for an ordinance violation. (19: 61).

Although the officers had such a willing and cooperative resident of the home, they never asked Max to identify Paul Wotnoske, in order to issue a citation to Paul (19: 61). Instead, Corporal Streubing apparently decided

to take matters into his own hands and resort to force out of frustration. (19: 61-62). This use of force does not, however, create or impute guilt of an ordinance violation on behalf of Paul Wotnoske. If anything, it flies in the face of the Supreme Court's opinion in Welsh which looks to the gravity of the underlying offense when reviewing police actions. The use of force, when another source of information was readily available to the police but unreasonably not utilized, presents an overwhelming imbalance of Wotnoske's right to privacy as against the state's interest in effective law enforcement. In this situation, the means used to achieve effective law enforcement were clearly inappropriate and out-of-proportion to the activity sought to be suppressed.

CONCLUSION

For all of the foregoing reasons, the United States Supreme Court should grant this petition, issue a writ of certiorari to the

Court of Appeals of Wisconsin, and it should summarily reverse the Wisconsin Court of Appeals.

This Court is presented with a decision which should have been corrected by the Court of Appeals of Wisconsin. As the error went unchanged and the Supreme Court of Wisconsin has denied a petition to review, this Court should correct the legal error involved and reaffirm its commitment to upholding its prior decisions and the important principles contained therein.

Respectfully submitted,

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